

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUFFOLK SUPERIOR COURT
DOCKET # [REDACTED]

COMMONWEALTH

v.

[REDACTED]

COMMONWEALTH'S MEMORANDUM IN OPPOSITION

I. Commonwealth's Proposed Facts

On December 4, 2009, the area E-18 Drug Control Unit along with D-14 DCU executed WR District Court SW # [REDACTED] [REDACTED] after arresting the target of the investigation, [REDACTED]. When stopped [REDACTED] had a medium-sized plastic bag containing heroin, keys to [REDACTED] (outside door and apartment), a Motorola cell phone and \$856 USD.

Sgt Detective Donald Keenan used the keys recovered from [REDACTED] to enter [REDACTED]. The officers knocked and announced their presence. After announcing several times with no answer, officers entered and found [REDACTED] watching TV in the bedroom. [REDACTED] were secured in the kitchen area and Mirandized, which they stated they understood. Sgt Detective Keenan explained the search warrants to [REDACTED]

[REDACTED]

Officers conducted a search of the apartment and seized the following:

1. \$9,100.00 USD [bedroom #1 bureau, PO Brown]
2. \$70.00 USD [bedroom #1 closet, Det Stanton]
3. \$42.00 USD [bedroom #1 closet jar on floor, PO Byrne]
4. Personal papers, [REDACTED] [bedroom #2 filing cabinet PO Hasan]
5. Personal papers, [REDACTED] [bedroom #1 bureau, PO Brown]
6. AWS silver digital scale [kitchen drawer, PO Young]
7. Plastic sandwich bags [kitchen drawer, PO Young] [how close to scale??]

8. Inositol powder [kitchen counter, PO Young]
9. Personal papers, [REDACTED] (Mass ID)
[bedroom #1 closet, PO Cutone]
10. Black Boost mobile cell phone [bedroom #1 closet, PO Cutone]
11. Four (4) p/b's (finger pressed) heroin weighing approximately 85 grams [utility closet, PO Cutone]
12. Personal papers in the name of [REDACTED]
[REDACTED] [bedroom #1 closet floor, Det Stanton]
13. Packaging material (plastic) [kitchen counter, Sgt Keenan]
14. Surgical masks [kitchen counter, Sgt Keenan]
15. Personal papers, [REDACTED] [bedroom #2, PO Boyle]
16. \$360.00 USD [kitchen table, PO Nunez]

[REDACTED] stated to PO Young that there was money and keys in the closet and there was about \$8000.00 in the bedroom bureau. He also stated he had moved into the apartment about two months prior. He stated he used his cousin's papers [REDACTED] [REDACTED] to get a Mass ID and that his cousin was in PR. [REDACTED] asked to take a long sleeve shirt from his bedroom before being removed from the apartment so that he could keep warm.

Prior to leaving, [REDACTED] pointed out a set of keys on the table and asked that [REDACTED] be able to have them so that she could lock the apartment. Sgt Detective Keenan handed her the keys so that she could take custody of the apartment after the warrant was executed.

II. Argument: This Court should deny the defendant's motion to suppress evidence and statements; the evidence was seized pursuant to a valid search warrant; the officers entered after knocking and announcing their presence and seized evidence after showing both [REDACTED] a copy of the search warrant; and, lastly, the defendant's statements were made post-Miranda, knowingly, intelligently and voluntarily.

a. Any evidence seized was pursuant to a valid search warrant, as such this court is bound by the four corners of the warrant. The officers entered after knocking and announcing their presence and seized evidence after showing [REDACTED] a copy of the search warrant. The defendant's challenge should fail.

To establish probable cause to search, the facts contained in an affidavit, and reasonable inferences that may be drawn from them, must be sufficient for the magistrate to conclude

'that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.'" Commonwealth v. Lopes, 455 Mass. 147, 164-165 (2009), quoting from Commonwealth v. Anthony, 451 Mass. 59, 68 (2008). The sufficiency of a search warrant application to establish probable cause is judged solely within the four corners of the affidavit. See Commonwealth v. Connolly, 454 Mass. 808, 813 (2009). In assessing the contribution of a confidential informant's tips to the probable cause analysis, the court should employ the familiar tests of the informant's veracity and basis of knowledge.

When an application for a warrant depends in significant part on information provided by a confidential informant, the affidavit must "apprise the magistrate of (1) some of the underlying circumstances from which the informant concluded that contraband was where he claimed it was (the basis of knowledge test), and (2) some of the underlying circumstances from which the affiant concluded that the informant was credible or the information reliable (the veracity test)."

Commonwealth v. Desper, 419 Mass. 163, 166 (1994); Commonwealth v. Warren, 418 Mass. 86, 88 (1994), citing Commonwealth v. Upton, 394 Mass. 363, 375 (1985). Here, the basis of knowledge test is satisfied, because the confidential informant personally observed the defendant selling drugs inside apartment during the controlled purchase. See Desper, 419 Mass. at 66; Warren, 418 Mass. at 89; see also Commonwealth v. Perez-Baez, 410 Mass. 43, 45 (1991); Commonwealth v. Carrasco, 405 Mass. 316, 321 (1989).

Further, the confidential informant's participation in the controlled purchase from the defendant will satisfy the veracity test set forth in Upton. Upton at 375; see Desper at 171; see also Warren at 89-91 (even an imperfect controlled buy may still establish veracity); Commonwealth v. Benlien, 27 Mass. App. Ct. 834, 838 (1989) (confidential informant's participation in a controlled buy repaired any weakness in a showing of the informant's reliability and lent strength generally to the affidavit).¹ The officers' corroboration of the confidential

¹ When reviewing the search warrant in this case, it is clear that the controlled buys in this case followed the familiar protocol recited in multiple cases. See, e.g., Commonwealth v. Desper, 419 Mass. 163, 168 (1994), and cases cited. The fact that one of the controlled buys occurred within the defendant's residence and that the police did not observe the transaction does not render the search warrant invalid. See, e.g., Commonwealth v. Warren, 418 Mass. 86, 90 (1994) ("police [are] not required to risk

informant's statements through their surveillance of the controlled purchases and on independent occasions bolsters the informant's credibility. See Commonwealth v. Valdez, 402 Mass. 65, 71 (1988). Additionally, the confidential informant's statements against his own penal interest can be considered when assessing veracity. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility -- sufficient at least to support a finding of probable cause to search. Commonwealth v. Parapar, 404 Mass. 319, 322 (1989) (citations omitted).

Lastly, there is the independent police corroboration of the confidential informant: in addition to the surveillance of the confidential informants' controlled buys, the last controlled buy was witnessed by Sgt Detective Keenan. This fact, standing alone, should provide probable cause for the issuance of the warrant. Commonwealth v. Cruz, 430 Mass. 838 , 842 n.2 (2000).

Based on the foregoing, the magistrate could have easily concluded that the confidential informant was both reliable and knowledgeable, satisfying both prongs of the Upton test. In this case, the confidential informant's veracity was established by the fact that he had previously given information which led to at least one arrest and seizure of contraband. See Commonwealth v. Perez-Baez, 410 Mass. 43, 46 (1991), and cases cited. Any weakness in the CI's veracity, or in their basis of knowledge -- if the latter was not fully established by their statements that the defendant had drugs in his apartment at a certain address and used a certain telephone number, and sold quantities of heroin -- was cured by the corroborative effect of the four controlled buys at or near that location. See Commonwealth v. Blake, 413 Mass. 823, 828-829 (1992).

disclosure of their surveillance by accompanying the informant" to an apartment within a multi-unit dwelling). Additionally, the seventy-two hour delay between the fourth controlled buy and the application for the search warrant is not troubling in these circumstances because the other information in the affidavit, including the three other buys, established a continuing pattern of conduct in a fixed location over a comparatively longer time frame. See Commonwealth v. Rice, 47 Mass. App. Ct. 586, 590 (1999) ("Where conduct is shown to be continuing . . . the passage of time becomes less important and staleness may be overcome"). The descriptions of the four buys, which all occurred at or near the residence that was the target of the search warrant, as well as the information provided by the confidential informant, furnished probable cause to issue the search warrant for the defendant's apartment.

Further, the officers did, in fact, knock and announce their presence. [REDACTED] was already in custody at the point officers executed the search warrant on the residence. In fact, the officers used [REDACTED] keys to make entry. After knocking and not getting any answer, officers used [REDACTED] keys to enter and found [REDACTED] in a bedroom watching television.

- b. The defendant's statements were made post-Miranda, and were knowingly, intelligently and voluntarily made.

The defendant's challenge to the admission of his statements should be denied in light of the fact that he was fully and clearly advised of his Miranda rights and he waived his rights knowingly, intelligently and voluntarily. The Commonwealth bears the burden of proving beyond a reasonable doubt, in the totality of the circumstances, that a defendant's [Miranda] waiver was voluntary, knowing and intelligent, and that his statements were voluntary. Commonwealth v. Auclair, 444 Mass. 348, 353 (2005), citing Commonwealth v. Jackson, 432 Mass. 82, 85-86 (2000).

Here, the defendant voluntarily told police that there was about \$8000.00 in his bedroom bureau - officers found \$9100.00 in that location. [REDACTED] also admitted that he used his cousin, [REDACTED] papers to get a Mass ID, and that his cousin was in Puerto Rico. Since the defendant cannot point to any overreaching by the officers, and since there were no promises, rewards or inducements, the defendant's motion should be denied.

III. CONCLUSION

Defendant's motion fails for the preceding reasons and the Commonwealth requests this Court deny the motion.

RESPECTFULLY SUBMITTED
FOR THE COMMONWEALTH,
DANIEL F. CONLEY
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FOR THE SUFFOLK DISTRICT

By:

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I hereby certify that a copy of the above
document was served to defense counsel
in hand/by mail/by fax on November 16, 2010.

Melissa L. Brooks, A.D.A.